IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1416 OF 2007

Tukaram Kacher Devlikar ..Petitioner

Versus

Shri Sitaram K.Devlikar and Ors. ..Respondents

Ms.Gauri Godse for the petitioner.

Mr.Sachin R.Pawar for respondent no.1.

Mr.Anilkumar Patil for respondent nos.2(1) to 2(6), 2(9).

Coram : A.P.DESHPANDE,J

Date : 12.10.2007

PC

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The petitioner and original defendant nos.1 & 2 are the real brothers. Defendant no.2 expired pending the suit and hence, his heirs are brought on record. The present petitioner/original plaintiff instituted the suit for declaration that the suit property is exclusively owned by him. The other relief is for deletion of the names of defendant nos.2 & 3 from the revenue record. The defendant no.2 has contested the suit, whereas the defendant no.1 has not contested the suit, which is pending on the file of the trial Court since 1995. The record reveals that on 7.8.1995 the defendant no.1 filed a

pursis at Exhibit-6 informing the Court that the defendant no.1 admits the claim in the suit. The suit proceeded further and the evidence of the plaintiff and his witnesses came to be recorded. The plaintiff closed his evidence by filing the pursis at Exhibit-74. Belatedly the defendant no.1 moved an application on 28.9.2006 and alongwith that application produced the written statement with a further request to take the same on record for consideration. It is stated in the application that the signature of the defendant no.1 was obtained by deceitful mean by the plaintiff at Exhibit-6. Baring this statement the application does not go to explain the particulars of fraud or deceit. No circumstances in which signature on Exhibit-6 of the plaintiff is obtained are set out in the application. The application was opposed by the plaintiff by filing a reply and the trial Court has by the impugned order held that the defendant no.1 will have to establish that his signature was obtained on the pursis at Exhibit-6 by fraud played by the plaintiff. The order then goes to observe that in the trial if the defendant no.1 fails to prove that signature was obtained by plaintiff by exercising a fraud, his evidence based on written statement can be dis-carded. The Court then observed that at the threshold the written statement ought not to be rejected. Issue of fraud being played by the plaintiff while obtaining signature of

the defendant no.1 on pursis at Exhibit-6 cannot be tried alongwith other issues in the main suit. It is only if defendant no.1 succeeds in proving fraud then and then alone defendant no.1 can be permitted to file the written statement and not otherwise. It cannot be lost sight of the fact that the suit has been pending for last 10 years and defendant no.1 has not effectively participated in the suit. There are no particulars of fraud assigned in the application and the issue of fraud will have to be determined at the threshold. In this view of the matter, I quash and set aside the order passed by the trial Court, as the order is patently illegal and is likely to result in mis-carriage of justice causing prejudice to the plaintiff. The trial Court shall permit the defendant no.1 to lead evidence touching the application filed by the defendant no.1 on 20.9.2006. Needless to mention that the plaintiff will also be offered an opportunity to lead evidence touching the application at Exhibit-79. If and in case the defendant no.1 succeeds in establishing fraud allegedly committed by the plaintiff in securing his signature at Exhibit-6 then and then alone the trial Court shall consider the written statement as legally tendered and permit the parties to lead evidence afresh in addition to the evidence already led. The defendant no.1 shall pay cost of Rs.4000/- to the plaintiff as directed by the trial Court if not already paid.

Rule made absolute in the above terms.

(A.P.DESHPANDE,J)